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No. 828

In the Supreme Court of the United States

OCTOBER TERM, 1958

K. LAWRENCE SIEGEL AND HADASSAH R. SHAPIRO,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	3
Argument	10
Conclusion	21

CITATIONS

Cases:

Alford v. *United States*, 282 U.S. 687	12
Brown v. *United States*, 245 F. 2d 549	12
Carroll v. *United States*, 16 F. 2d 951, certiorari denied, 273 U.S. 763	10, 15, 17
Claiborne v. *United States*, 77 F. 2d 682	12
Copeland v. *United States*, 152 F. 2d 769, certiorari denied, 328 U.S. 841	21
Dolan v. *United States*, 218 F. 2d 454, certiorari denied, 349 U.S. 923	11, 16
Glasser v. *United States*, 315 U.S. 60	12
Harrell v. *United States*, 220 F. 2d 516	11
Hirabayashi v. *United States*, 320 U.S 81	10
Jencks v. *United States*, 226 F. 2d 553, reversed, 353 U.S. 657	4, 5
LaSalle v. *United States*, 155 F. 2d 452	16
Lawn v. *United States*, 355 U.S. 339	10
Lindsey v. *United States*, 133 F. 2d 368	12
Pinkerton v. *United States*, 328 U.S. 640	10
Roviaro v. *United States*, 353 U.S. 53	10
Siegel & Shapiro v. *The Association of the Bar of the City of New York*, No. 773, this Term	4
Sinclair v. *United States*, 279 U.S. 263	10, 15
Travis v. *United States*, 123 F. 2d 268	11
United States v. *Alu*, 246 F. 2d 29	11, 12
United States v. *Bayer*, 331 U.S. 532	20
United States v. *Center Veal & Beef Co.*, 162 F. 2d 766	20

Cases—Continued

	Page
United States v. *Flynn*, 130 F. Supp. 412	4
United States v. *Flynn*, 216 F. 2d 354, certiorari denied, 348 U.S. 909	4, 5
United States v. *Henderson*, 185 F. 2d 189	15
United States v. *Hendrickson*, 200 F. 2d 137	15
United States v. *Hirsch*, 136 F. 2d 976, certiorari denied, 320 U.S. 759	16
United States v. *Manton*, 107 F. 2d 834	12
United States v. *Slutzky*, 79 F. 2d 504	11, 15

Constitution and Statutes:

U.S. Constitution, Sixth Amendment	11
18 U.S.C. 1001	4
18 U.S.C. 1503	3
18 U.S.C. 1621	3
New York Judiciary Law, § 90(4)	4

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A) is reported at 263 F. 2d 530. The opinion of the District Court, per Bryan, J. (Pet. App. B; R. 3485-3509), denying petitioners' pre-trial motion to dismiss the indictment is reported at 152 F. Supp. 370. The unreported opinion of the District Court, per Dawson, J. (R. 3472-3474), on petitioner's motion for a bill of particulars is printed as Appendix C to the petition. The unreported opinion of the District Court,

per Clancy, J. (R. 3470-3471), denying other pre-trial motions made by petitioners is printed as Appendix D to the petition.

JURISDICTION

The judgment of the Court of Appeals was entered on February 17, 1959. On March 18, 1959, an order was entered by Mr. Justice Harlan extending the time for filing the petition for certiorari to and including April 10, 1959. On April 10, 1959, an order was entered by Mr. Justice Brennan granting an additional extension of time for filing the petition to and including April 11, 1959. The petition was filed on April 11, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the determination of the materiality of testimony upon which a charge of perjury under 18 U.S.C. 1621 is based is a question for the court or the jury.

2. Whether the petitioners' admittedly false answers to questions before a grand jury were material.

3. Whether the prosecutor was guilty of prejudicial misconduct in his remarks to the jury during summation.

4. Whether the trial judge committed reversible error in his charge to the jury, his refusals to charge as requested, and in his rulings and conduct in the course of the jury's deliberations.

STATUTES INVOLVED

The statutes involved are set forth in the petition, pp. 5-6.

STATEMENT.

A twelve-count indictment (R. 3290-3310) was returned by a Federal grand jury in the District Court for the Southern District of New York on July 13, 1955, against the petitioners, R. Lawrence Seigel and Hadassah R. Shapiro charging them with conspiracy to obstruct justice, with obstruction of justice in violation of 18 U.S.C. 1503 and with perjury in violation of 18 U.S.C. 1621. The offenses charged in the indictment related to the destruction by the petitioners of original memoranda (and the stenographic notes from which the memoranda were prepared) of conversations, in 1954, between Mr. Siegel and one Harvey M. Matusow; the substitution therefor of altered memoranda and stenographic notes; the false testimony of the petitioners regarding the authenticity of the substituted memoranda; and their alleged corrupt influence on the testimony of another witness before the same grand jury.

A trial by jury was commenced on December 16, 1957. The jury returned verdicts of guilty on all six of the perjury counts and on three of the obstruction of justice counts, but acquitted on one conspiracy count and two obstruction of justice counts (R. 3207). On February 18, 1958, the trial judge imposed upon Mr. Siegel suspended sentences and placed him on probation for a year and a day on each of the seven counts on which he was convicted, the sentences to run concurrently. In addition, he imposed a fine of $500 upon each of the four perjury counts (R. 3653). Miss Shapiro received suspended sentences on all five of the counts on which she was convicted, and was placed on probation for one year, the sentences to run concur-

rently [1] (R. 3654). On appeal to the Court of Appeals for the Second Circuit, the judgments of conviction were affirmed (263 F. 2d 530; Pet. App. A).

The evidence adduced by the Government may be summarized as follows:

In January, 1955, Harvey M. Matusow, a former Communist and F.B.I. informant who had testified as a Government witness in two trials involving charges against Communists[2] swore, in two affidavits filed in support of motions for a new trial made by the defendants in those cases, that his testimony as a Government witness had been false. Moreover, in his affidavit filed in one of the cases,[3] Mr. Matusow swore not only that his testimony was false, but that a former Assistant United States Attorney, Roy M. Cohn, had known it to be false and had helped him fabricate it (R. 112-114).

Mr. Matusow's about-face led to the impanelling of

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[1] As a result of their perjury convictions, the petitioners, who were attorneys authorized to practice in the State of New York (R. 1806-1808, 2329), were automatically disbarred pursuant to Section 90(4) of the New York Judiciary Law. An attempt by petitioners to obtain review of this action by the State of New York is presently pending before this Court. *Rubin L. Siegel and Hadassah R. Shapiro, Attorneys* v. *The Association of the Bar of the City of New York*, No. 773, this Term.

[2] In 1952, Mr. Matusow testified for the Government in the Smith Act trial of Elizabeth Gurley Flynn and twelve other Communists in the District Court for the Southern District of New York. The trial resulted in the conviction of all thirteen defendants. See *United States* v. *Flynn*, 216 F. 2d 354 (C.A. 2), certiorari denied, 348 U.S. 909. In January 1954, he testified against Clinton E. Jencks who was tried and convicted in the District Court for the Western District of Texas for filing a false non-Communist affidavit in violation of 18 U.S.C. 1001. See *Jencks* v. *United States*, 226 F. 2d 553 (C.A. 5) reversed, 353 U.S. 657.

[3] *United States* v. *Flynn*, 130 F. Supp. 412 (S.D. N.Y.).

a grand jury in the Southern District of New York on February 8, 1955 (R. 112), to determine the truth or falsity of his testimony and subsequent recantations. Specifically, the scope of its investigation was to determine whether Mr. Matusow had testified falsely as a Government witness in the *Flynn* and *Jencks* cases, and, if so, whether Mr. Cohn had been an instigator of perjury in the *Flynn* case; or whether, on the other hand, Mr. Matusow's recanting affidavits were false, and, if so, whether others had conspired to induce him falsely to recant (R. 115-117, 1035, 1097-1098). As part of its investigation into these matters, the grand jury questioned persons who had had contact with Matusow in the interval between his appearances as a witness and his recantations to learn whether he had ever told anyone during this period that he had given perjured testimony as a Government witness (R. 117-118, 1134).

Among the witnesses called was Mr. Siegel, a lawyer, who testified freely with respect to seven conversations with Mr. Matusow (R. 403-435). He indicated that he had dictated contemporaneous memoranda concerning these talks and was asked to produce them (R. 430-432). Instead he prepared a "chronological memorandum" of the information, discrepancies between which and his testimony led to a renewal of the request that he produce the memoranda (R. 1102, 1105, 1157-1160, 1163, 1180).

During the week preceding Mr. Siegel's second appearance before the grand jury, he, together with Miss Shapiro, an attorney in his office who also acted as his secretary, destroyed at least four of the original memoranda and prepared others in their place dating

them with the dates of the original memoranda (R. 654-655, 693, 695, 767). On March 17th Mr. Siegel appeared before the grand jury and produced these substituted memoranda (G. Ex. 32; R. 484-486) testifying, *inter alia*, that those dated April 21st, May 3rd and June 18th, had all been typed at or about those dates in 1954, and that he "couldn't say" when the November 3rd memorandum had been typed (R. 492, 493-498; G. Ex. 3). He also testified that the memoranda he had produced were "exactly what * * * [he] had told * * * [Miss Shapiro] and dictated to her at the time." (R. 493-494). Contrary to his testimony, however, and as he was later to admit, the April 21st, May 3rd, and June 18th memoranda which he produced were not typed at or about those dates. As Mr. Seigel knew, all of these as well as the November 3rd memorandum had been retyped within a week preceding his March 17th grand jury appearance (R. 676-677, 691, 767) and, in the process of retyping, material had been purposefully and willfully eliminated.

On Saturday, March 19th, the Assistant United States Attorney telephoned Mr. Siegel to inform him that the grand jury desired to question the persons to whom he had dictated the underlying shorthand notes from which the memoranda had been prepared. Miss Shapiro called the Assistant United States Attorney and informed him that she had found most of the notes; that she was the person to whom Mr. Siegel had dictated most of the notes; but that some had been dictated to a Mrs. Mary Manna (R. 1109-1110).

On Sunday, March 20th, Mr. Siegel, Miss Shapiro, and Mrs. Manna met at Mr. Siegel's apartment. Miss Shapiro had taken with her Mrs. Manna's notebook

containing the original notes for the April 21st memorandum (R. 613-614). The three undertook to fabricate shorthand notes to conform to the fictitious memoranda which Mr. Siegel had produced before the grand jury on March 17th. Mrs. Manna was instructed to remove the pages which contained the original notes from her notebook. These original pages were later destroyed by Mr. Siegel (R. 611-613). While Miss Shapiro read from a copy of the altered April 21st memorandum (R. 599), Mrs. Manna crammed new notes into a partially blank page in the same notebook (R. 888-890; G. Ex. 14). Mrs. Manna received instructions on what to tell the grand jury the next day if questioned concerning her rewritten notes (R. 611). On the same day, Miss Shapiro created other notes to conform to the June 18th and November 3rd memoranda and a portion of the "chronological memorandum" (R. 717-722).

On the following day, March 21st, all three appeared before the grand jury and gave false testimony about the authenticity of the shorthand notes which were produced that day (G. Exs. 9, 18, 22). Mr. Siegel testified that he had examined the shorthand notes the previous day and compared them with the memoranda and that "there were no variations in the transcripts" (R. 516). He also testified that there were additional notes which had not been typed and that the information contained in these additional notes had found its way into the chronological memorandum (R. 520). Miss Shapiro produced the fabricated notes (G. Exs. 15, 16, 17) and testified that they were the original notes for the June 18th and November 3rd memos and the additional notes which had not been typed (R. 577-581). She also produced Mrs. Manna's notebook containing

the fabricated notes (G. Ex. 14) and testified that the latter had typed the April 21st memorandum on or about that date (R. 560-563). Mrs. Manna then testified that the fabricated notes had been dictated to her on or about April 21st and that the notes produced were those which she had taken at that time (G. Ex. 18, p. 1238).

Later that same day (March 21st) the Assistant United States Attorney, in thumbing through Mrs. Manna's stenographic notebook, noticed that the notes for the April 21st memorandum were more cramped together than the other notes in the book. It was then that he began seriously to suspect that the notes and the memorandum had been recently fabricated. He called Mr. Siegel to inform him that the grand jury wished to examine Mrs. Manna further the following morning. At the same time he warned him that if his own testimony about the notes and memoranda had been false he should set the record straight without delay (R. 1113-1114).

In their subsequent grand jury appearances the petitioners admitted the destruction of the original documents and the fabrication of the substitutes, insisting, however, that the alterations in the substitutes were immaterial (G. Exs. 4, 10, 11, 12, 13, 26, 27, 28). Since the petitioners had destroyed the original memoranda it was difficult for the Government to prove the substance of material deleted other than that which was admitted. It appeared that the conversation between Mr. Siegel and Mr. Matusow on April 21, 1954, wherein the latter had discussed his career as a Government witness, had been represented in the substitute memoranda as having taken place entirely in Mr. Siegel's

office whereas, in fact, portions of it took place at a restaurant and at the Fifth Avenue apartment of Miss Gloria Swanson at which time Miss Swanson and a Mr Lewis Bredin were present (R. 676, 1624-1625, 1867-1869, 2809-2810). The June 18th fabricated memorandum had misrepresented the place where the conversation on that date had taken place as at Mr. Siegel's office rather than at the Blair House, a restaurant, and omitted reference to the fact that a Mr. Michael Shore was present and had examined and discussed with Mr. Matusow a manuscript of a book (later published under the title "False Witness") which Mr. Matusow was seeking to have published (R. 990-992, 2227). The proof established also that omitted from the fabricated memorandum of November 3rd was the fact that Mr. Matusow had called Miss Swanson in Dallas, Texas, and the substance of his conversation with her at that time—facts which had been contained in the original November 3rd memorandum (R. 644, 2222, 2382, 2408).

Miss Swanson, Mr. Bredin and Mr. Shore were clients of petitioner Siegel in his law practice (R. 988, 1867-1868; 2042, 2806-2807, 2808-2809, 2819, 2822). In his first appearance before the grand jury, on March 3rd, Mr. Siegel had volunteered that Mr. Matusow had once followed him to Miss Swanson's apartment and that Mr. Matusow had told him of calling Miss Swanson in Dallas (G. Ex. 2, pp. 751-752). In spite of the fact that Mr. Siegel had voluntarily informed the grand jury of these facts on March 3rd, however, both he and petitioner Shapiro persistently maintained thereafter that their motivation in doing what they subsequently did stemmed from a desire to protect from adverse publicity these clients who allegedly had

nothing to do with Mr. Matusow's recantations, and that their conduct was justified because they were bound by the attorney-client privilege to withhold the names of these clients (R. 605-607, 744, 2246-2250).

ARGUMENT

The suspended sentences which petitioners received on each of the counts upon which they were convicted were made to run concurrently and the fines which Mr. Siegel received were imposed only on the perjury counts (*supra*, pp. 3-4). Under these circumstances Miss Shapiro's conviction is sustainable if it was valid with respect to any one of the counts upon which she was convicted and, with respect to Mr. Siegel, it is necessary to consider only the validity of his conviction on each of the perjury counts. Cf. *Lawn* v. *United States*, 355 U.S. 339, 359; *Roviaro* v. *United States*, 353 U.S. 53, 59, fn. 6; *Pinkerton* v. *United States*, 328 U.S. 640, 641-642, fn. 1; *Hirabayashi* v. *United States*, 320 U.S. 81, 85, 105.

1. The petitioners contend (Pet. 16-23) that the trial judge, in treating the question of the materiality of their admittedly false testimony as one of law to be determined by the court, withheld from the jury's consideration a very important "fact" issue and deprived them of their constitutional right to a jury trial upon all elements of the crimes charged. We submit that the petitioners' contention is without merit.

It is a well-established principle that the issue of "materiality" of testimony in a prosecution for perjury is a question of law to be determined by the court and not by the jury. *Sinclair* v. *United States*, 279 U.S. 263, 298; *Carroll* v. *United States*, 16 F.2d 951, 954 (C.A.

2), certiorari denied, 273 U.S. 763; *United States* v. *Slutzky*, 79 F. 2d 504, 506 (C.A. 3); *Travis* v. *United States*, 123 F. 2d 268, 270 (C.A. 10); *Dolan* v. *United States*, 218 F. 2d 454, 457 (C.A. 8), certiorari denied, 349 U.S. 923; *Harrell* v. *United States*, 220 F. 2d 516, 518 (C.A. 5); *United States* v. *Alu*, 246 F. 2d 29, 32 (C.A. 2).

The cases cited by petitioners (Pet. 17) hold that the right to a trial by jury in criminal cases guaranteed by the Sixth Amendment precludes the trial judge from withholding from the jury's consideration issues of *fact* constituting one or more of the elements of the crime charged, even when the prosecution evidence is uncontradicted. Insofar as we have been able to determine, however, no case has held that a trial judge's direction to a jury based on a conclusion of *law* contravenes the Sixth Amendment. There can be no serious question, therefore, since it is well established that materiality in a perjury prosecution is a question of law (*supra*, pp 10-11), that the trial judge correctly withheld consideration of that question by the jury below (R. 3074).

There is no substance, moreover, to petitioners' additional contention that the trial judge committed prejudicial error in his application of the rule that "materiality" is a question of law to be determined by the court. The petitioners complain (Pet. 16, 17) merely that the trial court curtailed cross-examination and excluded independent evidence tending to impeach the testimony of government witnesses, that the grand jury wanted to interview all persons who had conversed with Mr. Matusow. This latter testimony however, was clearly collateral to the issue of materi-

ality. Since the determination of materiality was a matter for the court alone and there was abundant and undisputed proof of materiality, the trial judge did not err in limiting cross-examination on the details of how the grand jury went about its work. The extent to which cross-examination upon collateral matters shall go is a matter peculiarly within the discretion of the trial judge. *Glasser* v. *United States*, 315 U.S. 60, 83; *Alford* v. *United States*, 282 U.S. 687, 694. Generally, his action will not be interfered with unless there has been a plain abuse of discretion. *United States* v. *Manton*, 107 F. 2d 834, 845 (C.A. 2); *Lindsey* v. *United States*, 133 F. 2d 368, 369 (C.A.D.C.). The trial judge properly forbade a prolonged fishing expedition into whether the grand jury has summoned for questioning every person who might have talked to Mr. Matusow and, if not, why not. Cf. *Claiborne* v. *United States*, 77 F. 2d 682, 690 (C.A. 8). This could only have served to confuse the jury without further enlightening the court or in any way impeaching the proof of materiality. There was plainly no abuse of discretion. Nor was there any error, as petitioners suggest (Pet. 16, 18) in the trial judge's determination of the materiality issue at the completion of the government's case. See *United States* v. *Alu*, *supra*, 246 F. 2d 29, 32; *Brown* v. *United States*, 245 F. 2d 549, 552-554 (C.A. 8).

2. Both the grand jury foreman and the Assistant United States Attorney testified that the grand jury was conducting an investigation to determine whether Mr. Matusow's trial testimony or his recantation affidavits were true, and, if the former, whether a conspiracy existed to induce him to recant (R. 115-117,

1035, 1097-1098). This testimony as to the scope of the grand jury investigation was not disputed at the trial, nor is any question now raised as to its accuracy. Since this was the undisputed subject matter of the grand jury's investigation, it is clear that the original memoranda and notes, which admittedly concerned conversations between Mr. Siegel and Mr. Matusow at which Mr. Matusow discussed his trial testimony, were intimately related to the issues under investigation by the grand jury and that the petitioners' testimony regarding the authenticity of these documents was "material".

Though petitioners admit that their answers regarding the authenticity of the memoranda and notes they produced before the grand jury were false, and were known by them to be false when the answers were given (Pet. 17, 27), they contend that these false answers (*i.e.*, that the papers produced were originals), as well as the truthful answers (*i.e.*, that the papers produced were recently retyped and rewritten copies of the originals, containing deletions), if they had been given, were immaterial (Pet. 27). This conclusion is bottomed on the assumption that it must necessarily be viewed as established, since there was allegedly no proof to the contrary, that the only matters deleted from the originals were those concerning petitioner Siegel's clients, Miss Swanson, Mr. Bredin and Mr. Shore. As the reasoning goes, since all three of these persons were later called before the grand jury and their testimony revealed that they were ignorant of any relevant information about Mr. Matusow, petitioners' false answers, even if they had gone undiscovered, would not have had the effect of depriving the grand

jury of any information relevant to its investigation, and thus were not material.

In its opinion affirming the petitioners' convictions (Pet. App. A), the court below refuted the theory that materiality is determinable only from the actual effect of the false answers upon the ultimate questions under investigation by the grand jury, by pointing out that such reasoning "substitutes the opinion of the witness for that of the tribunal as to the 'materiality' of the answer." "No matter how right the witness might be in believing that the answer would not contribute to the investigation", the court noted, "he was bound to leave that decision to the tribunal." (*Id.*, at pp. A5-A6). The court, per Judge Hand, reasoned further that (*id.*, at p. A5):

> The error of appellants' position is that they confuse the "materiality" of the question with the "materiality" of the answer, as though it was proof that the question was immaterial, if the answer would have been so.

and ruled that (*id.*, at p. A6):

> A question is "material," no matter what the answer may be, unless it appears by its terms that the answer cannot be "material."

The petitioners contend (Pet. 24-30) that this language "presents a hitherto unprecedented and radically unsound proposition, which ignores the text of the perjury statute and substitutes what is conceivable intellectually * * * for common law evidence of actual materiality" (Pet. 24). We believe that the court's

test of materiality is in harmony with the expressions of this Court and other federal courts on that subject.

In *Sinclair* v. *United States*, 279 U.S. 263, 298-299, this Court pointed out that the question of materiality in a prosecution for perjury "is not essentially different" from the question of pertinency in prosecutions for contempt of Congress under Section 102 of the Revised Statutes. Having equated "pertinency" to "materiality", the Court said:

> The matter for determination in this case was whether the facts called for by the question were so related to the subjects covered by the Senate's resolutions that such facts reasonably could be said to be "pertinent to the question under inquiry." * * *

In *United States* v. *Slutzky*, 79 F. 2d 504, 506 (C.A. 3), it was held that:

> The phrase "material matter" as used in the statute in referring to perjury means one that is legally capable of being proved in the cause * * *.

In *United States* v. *Henderson*, 185 F. 2d 189, 191 (C.A. 7), the court observed that "the actual effect of the false testimony is not the determining factor" in establishing materiality in perjury prosecutions. See also *United States* v. *Hendrickson*, 200 F. 2d 137, 139 (C.A. 7). And, in *Carroll* v. *United States*, 16 F. 2d 951, 953 (C.A. 2), certiorari denied, 273 U.S. 763, it was specifically held that:

> The test of materiality in a grand jury's investigation is whether the false testimony has a natural effect or tendency to influence, impede, or dissuade

> the grand jury from pursuing its investigation * * *.

See also *United States* v. *Hirsch*, 136 F. 2d 976 (C.A. 2), certiorari denied, 320 U.S. 759; *Dolan* v. *United States*, 218 F. 2d 454, 458 (C.A. 8), certiorari denied, 349 U.S. 923; *LaSalle* v. *United States*, 155 F. 2d 452, 454 (C.A. 10).

Like the test formulated by the court below, the various tests of materiality expressed in these cases all refute the proposition that materiality of false testimony is established only if it is shown to have had an effect upon the ultimate issues to be determined by the tribunal. That the reasoning of the court below was in conformity with these recognized tests of materiality, especially the one expressed in the *Carroll* case, quoted above, is evidenced, moreover, by other language in the court's opinion (Pet. App. A, p. A6):

> If Siegel was right in supposing that a truthful answer could not have assisted the grand jury, no doubt it would be reasonable to temper the severity of the sentence, as Judge McGohey did in the case at bar. *But the eventual impertinence of what was concealed could not excuse preventing by false testimony the grand jury from deciding that question.* [Emphasis added.]

And, since the court below held that "'[i]n the case at bar it was enough to make Siegel's *testimony* 'material' as to the originality of the memoranda that the interviews between him and Matusow might have thrown light upon his recantation" (*ibid.*; emphasis added), it is clear that there is no substance to petitioner's contention (Pet. 25-27) that Judge Hand's reasoning ig-

nored the text of the perjury statute and confused the test for contempt with the test for perjury by emphasizing the materiality of the questions rather than the materiality of the answers.

In *Carroll* v. *United States, supra,* 16 F. 2d at 953, the court explained the nature of a grand jury investigation:

> Its investigation and full duty is not performed unless and until every clue has been run down and all witnesses searched for and examined in every proper way to find if a crime has been committed, and to charge the proper person with the commission thereof. Its investigation proceeds step by step. A false statement by a witness in any of the steps, though not relevant in an essential sense to the ultimate issues pending before the grand jury, may be material, in that it tends to influence or impede the course of the investigation. * * *

When viewed in the light of the purpose of a grand-jury inquiry, it is abundantly clear that the Matusow grand jury had a right to insist both upon the production of the original memoranda and notes and upon honest answers to questions concerning their authenticity. The originals would have been useful either to corroborate or to impeach Mr. Siegel's oral testimony about his contacts with Mr. Matusow. Their destruction, and the lies intended to conceal the fact that the originals had been destroyed, thus tended "to influence, impede, or dissuade the grand jury from pursuing its investigation * * *." *Carroll* v. *United States, supra.*

3. The petitioners' additional contentions—that the Assistant United States Attorney misused the grand

jury which indicted the petitioners in deprivation of their constitutional rights (Pet. 31-35); that the petitioners were deprived of a fair trial by the allegedly prejudicial remarks of government counsel in summation (Pet. 36-40); and that the trial judge committed reversible error in his charge to the jury, his refusals to charge as requested, and in guiding the jury during its deliberations (Pet. 41-47)—are in our opinion wholly lacking in substance and, as characterized by the court below (Pet. App. A, p. A6), "too trivial" to require extended discussion.

a. The petitioners charge (Pet. 31-35) that Assistant United States Attorney Bolan misused the grand jury by recalling Mr. Siegel before it and questioning him after he had admitted his falsehoods, merely to discredit him by indicting him and thereby excusing the Government's alleged suppression of his evidence in the *Flynn* proceedings (Pet. 33) is unsupported by the record. The record reveals rather that Mr. Bolan's motive in pursuing the true facts about Mr. Siegel's memoranda and notes and making them known to the grand jury was to uncover what he had ample reason to suspect had been a "wilful and deliberate deception of the grand jury" (R. 1116). And, as a government attorney engaged in assisting a grand jury in its investigation, Mr. Bolan's conduct was not merely permissible but, in fact, the required conduct of an attorney aware of the duties and responsibilities of his position. Moreover, contrary to the petitioners' suggestion (Pet. 32), they were given ample opportunity during two and a half days of cross-examination of Mr. Bolan (R. 1125-1217, 1508-1585, 1589-1664) to convince the jury of his alleged bias and improper

motives. Obviously the latter were not convinced of this fact. The petitioners' present argument is no more than an attempt to relitigate an issue properly determinable by the jury.

b. There is likewise no merit to the petitioners' contention (Pet. 36-40) that they were denied a fair trial by the prosecutor's remarks during summation, allegedly misstating facts and imputing motives for the petitioners' actions which not only were not fairly inferrable from the evidence, but in direct contradiction to the only record evidence on the subject. Contrary to the petitioners' contention, there was evidence in the record (R. 1624) from which the prosecution could reasonably argue that there might have been material deleted from the original memoranda other than that relating to Mr. Siegel's clients and that his reason for destroying the originals may have stemmed from an intent to conceal his true relationship with Mr. Matusow. The summation accurately summarized the evidence and fairly rebutted defense arguments of good motive. The prosecutor was not guilty of prejudicial misconduct.

c. As to the petitioners' contention (Pet. 41-47) that the trial judge committed prejudicial error in his conduct of the trial, the Government's position is well summarized by the Court of Appeals, which in discussing this point below noted (Pet. App. A, p. A6):

> Nothing * * * could be more unwarranted than the charge that Judge McGohey was unfair or partial in his conduct of the trial. On the contrary he showed the utmost concern for the rights of the appellants whose strictures display an

entire misapprehension of the essentials of a judge's duties.

The court's charge was clear and fair from beginning to end. The trial judge took great pains to explain the nature of the charges and the applicable law (see R. 3043-3100). He admitted that his instruction to the jury, that petitioner Siegel's admission that his grand jury testimony concerning the April 21st memorandum was false was "equivalent to a plea of guilty" (R. 3077, 3078), was erroneous, and he cured the defect by a supplemental charge pointing out the elements of the crime which must be found by the jury (R. 3149-3150).

Notwithstanding the petitioners' contention to the contrary, moreover, the trial judge did not commit reversible error in his instructions to the jury during its deliberations. After he had honored a number of requests by the jury to clarify or give additional instructions on various points of his charge (R. 3164-3167, 3189-3190, 3191-3192) he refused to give further instructions requested by the jury after they had been deliberating for almost eight hours, on the ground that he was "unable to make it any clearer" than he had in his original instructions (R. 3196). His action in this respect was a matter of discretion. Once the judge has made an accurate and correct charge, the extent of its amplification must rest largely in his judgment. *United States* v. *Bayer*, 331 U.S. 532, 536-537; *United States* v. *Center Veal & Beef Co.*, 162 F. 2d 766 (C.A. 2). Similarly, the honoring of a request by the jury to have made available to them the transcript of the court's charge rests in the complete

discretion of the trial judge. *Copeland* v. *United States*, 152 F. 2d 769 (C.A.D.C.), certiorari denied, 328 U.S. 841.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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